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In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 414

SALVATORE ANNUNZIATO,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States:

The petitioner, Salvatore Annunziato, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case, July 26, 1961.

The opinion of the Court of Appeals (LUMBARD, GOODRICH and FRIENDLY, Circuit Judges) is thus far unreported and is reprinted in petitioner's Appendix A. Petition for rehearing was denied without opinion. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

The judgment of the Court of Appeals from which petitioner seeks review affirmed a judgment of conviction for violation of Section 186 of Title 29, United States Code. At the times relevant to the alleged offense, Section 186, in pertinent part, declared it:

> ". . . unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

Defendant-petitioner was charged with two separate violations of the aforecited statute, the first count by indictment and the second by information. At trial of the case, a jury acquitted petitioner on the information but found him guilty of the offense charged in the indictment. Appeal was taken to the Court of Appeals for the Second Circuit; that court, on July 26, 1961, affirmed the conviction.

A petition for rehearing was filed with the Court of Appeals on August 9, 1961. Although the court, on August 14, 1961, declined to rehear the case, it did at that time order a stay of mandate for thirty days pending a petition for certiorari to be filed in this Court.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in refusing to hold that a de facto defendant, called to testify before a grand jury inquiry, must be apprised of the fact that he is the object of the investigation?

2. Did the Court of Appeals err in upholding the trial court's arbitrary refusal to submit the following query to the prospective jurors on *voir dire*: "Are you a member or contributor to any organization that has as its object law enforcement?"

3. Did the Court of Appeals err in holding that various pieces of hearsay testimony were properly admitted into evidence against defendant?

4. Did the Court of Appeals err in holding that failure to order produced a prior statement to the F.B.I. made by one of the government witnesses was not "prejudicial" because the statement "jibed" with the witness' trial testimony?

5. Did the Court of Appeals err in holding that the petitioner was not entitled to production of a typed F.B.I. report of an interview with another government witness because the defense "failed to demand it"?

REASONS FOR ALLOWANCE OF THE WRIT

Statement of the Facts

In 1957 the Terry Contracting Company, Incorporated was engaged in the construction of the Connecticut Turnpike in the City of Bridgeport. During this same period the defendant, Salvatore Annunziato, was business agent for the International Union of Operating Engineers, AFL-CIO, and his responsibilities included the supervision of the Terry company job site. This was the background situation which led to criminal charges against the defendant.

In September, 1959, the defendant was subpoenaed to testify before a grand jury for the District of Connecticut in a John Doe proceeding. He was asked many questions, some of which he answered, but as to others he invoked the right against self-incrimination. Inspection of the transcript by the Court of Appeals re-

vealed that Annunziato was informed of his right against self-incrimination, but it appears he was never advised of the nature and purpose of the investigation — or that he was the hunted party. The nature of many of the questions asked, as they were revealed at a later contempt hearing, strongly indicated that the defendant was marked for prosecution, and was a de facto defendant.

In May of 1960, after again attempting to "persuade" defendant to answer some blatantly incriminating questions, the grand jury returned an indictment. Count 1 alleged that on or about July 3, 1957, the defendant "did knowingly, willfully and unlawfully receive and accept, agree to receive and accept, money and other property of value, to wit: $300.00." Count 2 charged substantially the same in regard to $50.00 alleged to have been received by defendant on or about December 24, 1957.

Prior to trial, the Government filed an information charging defendant with substantially the same offense as contained in Count 2 of the indictment. At trial, the Government moved to nolle Count 2 of the indictment and to consolidate the indictment and the information for trial. This motion was granted without objection by the defendant. (R. 2, 3)

The defendant requested that the trial judge ask the prospective jurors thirteen questions on *voir dire*. The court covered all of them in substance with the exception of Numbers 4 and 12, which the court specifically declined to ask. (R. 1) The key question on this petition, as aforementioned, was, "Are you a member or contributor to any organization that has as its object law enforcement?"

At trial, the Government attempted to substantiate the allegations in the indictment and the information through a series of witnesses who were either officers or employees of the Terry company. With regard to the indictment, the testimony indicated that on July 2, 1957, Harry Terker, then president of the Terry company and

deceased at the time of trial, met William Mayhew, chief engineer, in the company's New York office, and gave him an envelope of undisclosed contents to be delivered to the defendant in Bridgeport the following day. (R. 169-181) Testimony also tended to show that the defendant was at the job site the following day, and received an envelope from Mayhew. (R. 26, 119, 171)

In an attempt to show the contents of this envelope, the Government then used a series of admittedly hearsay conversations among the employees and officers of the Terry company. Richard Terker, then secretary, testified that his father, Harry Terker, said that the defendant had made a telephone request for money, and that he, Harry Terker, "had agreed to send some up to Connecticut for him," (R. 368), mentioning the sum of $250.00. (R. 395) Ralph Cohen, comptroller, testified that he had given Harry Terker $300.00 from the petty cash account on June 28, 1957, and that he knew from hearsay sources that the money was for someone on the Bridgeport job. (R. 305-311) William Mayhew testified to the conversation he had with Harry Terker when he received the envelope. (R. 444-446) All these conversations were admitted over the defendant's objections. The justification given for their admission was that the co-conspirator exception to the hearsay rule might be applicable. However, the trial court warned that the Government must connect these conversations by establishing with independent evidence the existence of the conspiracy and defendant's connection with it. (R. 306, 360, 441)

In regard to the information, testimony showed that an envelope containing $50.00 was delivered to one Palumbo by Arthur Van Dommellen. (R. 125, 405-409) It was also shown that Palumbo was a member of the Operating Engineers, a friend of defendant's, and present at a party with defendant on December 24, 1957. (R. 409) But also allowed in over defendant's objection was a conversation between Mayhew and Van Dommellen. (R. 134, 218-221)

At the close of the Government's case, the defendant moved to strike the hearsay testimony on the grounds that the Government had failed to establish by independent evidence the existence of a conspiracy and defendant's connection with it. (R. 498) The motion to strike was also directed at certain evidence relating to the information. (R. 504) The motion was denied in entirety. (R. 584) The defendant's motion for judgment of acquittal was also denied. (R. 584, 604) The defendant then rested without presenting any evidence and renewed his motion for judgment of acquittal. (R. 606) This was again denied. (R. 607) A motion for mistrial was made and denied. (R. 614-617)

During the presentation of the Government's case, it was disclosed that an F.B.I. report of an interview with witness Walter Haas was in existence. The trial court inspected the report and allowed defendant to examine the witness regarding the interview. However, the trial judge made no effort to ascertain for himself whether the report should be produced under 18 U.S.C. 3500. The trial court then refused to order its production. (R. 45)

It was also determined that longhand notes had been taken during an F.B.I. interview with Richard Terker. (R. 372) However, the trial court did not rule on whether they constituted a statement within 18 U.S.C. 3500 (e) because of the Government's claim that they had been destroyed in the normal course of business. (R. 383) When the defendant attempted to pursue this point, the trial court requested that the matter be dropped. (R. 389)

The jury acquitted the defendant on Count 2 but found him guilty on the first count. On appeal, the judgment of conviction was affirmed, petitioner's arguments being rejected on all points. As to the hearsay objections, the Court of Appeals sustained the admissibility of the crucial Richard Terker testimony not only on the basis of the so-called co-conspirator rule (upon which the

prosecution and trial court relied) but also in reliance on the "*Hillmon* rule." The court upheld the trial judge's failure to allow defense access to the F.B.I. report on the Richard Terker interview on the grounds that "defendant made no such request." In connection with the F.B.I. report of the Haas interview, the Court of Appeals, although indicating that failure of the trial judge to call agent Clemente of the F.B.I. was probably error in view of this court's holding in *Campbell* vs. *United States*, 365 U.S. 85 (1961), held that such error could not have been prejudicial because, the court said, the prior statement checked out so closely with the witness' trial testimony.

As To The First Question Presented

A De Facto Defendant Called Before The Grand Jury Must Be Apprised Of That Fact And Must Be Informed Of The Nature Of The Proceedings Against Him.

The defendant has, of course, never seen a transcript of the grand jury proceedings. At a pre-trial hearing on a motion to dismiss the indictment, defendant moved that the entire grand jury transcript be certified as part of the record on appeal; the district court refused to do so, certifying only the record of defendant's grand jury testimony. We believe, however, that even that fragment of the transcript and the attendant circumstances, will show rather conclusively that Annunziato was the marked defendant long before an indictment was returned. (If not, we assign the district court's refusal to certify the entire transcript for appeal as error).

The Court of Appeals has informed us that defendant was warned of his privilege — and that it was freely invoked. But such a limited warning is not enough in the present circumstances. A mere witness is unlikely to be asked an incriminating question. A de jure defendant has been placed on guard by the implications of formal charge, and brings to all judicial proceedings the bundle

of rights his status entails. But the de facto defendant stands in a unique and anomolous situation. Marked for prosecution, standing naked of assistance and comfort before the inquisitorial process of the grand jury, he is in a vulnerable position. Without a warning, he will not comprehend the full measure of his rights. Moreover, without knowing the nature and purpose of the proceedings, he will be unable to exercise the privilege intelligently. A seemingly innocuous question may be pregnant with incriminating implications when the scope of the investigation is an enigma.

Nor is it sufficient to say, as did a Court of Appeals in *United States* vs. *Scully*, 225 F.2d 113 (2 Cir. 1955), that this is a matter of ethics and fair play for the prosecutor. Constitutional rights are not part of a game. The books contain too many cases of de facto defendants being summoned before grand juries, to believe serious abuses are not occurring. The wily prosecutor, by delaying formal accusation, has much to gain and nothing to lose if defendant's rights are not real. What purpose could there be in delaying formal accusation? There is only one. To elicit information that could not legally be obtained after de jure status was achieved, *Mulloney* vs. *United States*, 79 F.2d 566 (1 Cir. 1935), *United States* vs. *Lazen*, 115 F. Supp. 674 (S.D.N.Y. 1953), *Powell* vs. *United States*, 226 F.2d 269 (D.C. Cir. 1955), and to lure the unsuspecting citizen into damaging testimony.

There is only one practical safeguard — to require the grand jury to warn all witnesses marked for prosecution of that fact and of the nature and purpose of the investigation. Although the court below asserted the defendant regularly invoked his privilege in response to questions which were incriminating, lack of prejudice should not lightly be assumed. Having not been fully forewarned, defendant may not have been aware of the import of those questions he did answer. Later, denied a transcript of his testimony, fear of his prior statements may become a compelling consideration in not taking the stand — and, as a practical matter, this is always

a most dangerous course as the jury is almost certain to draw an unfavorable inference from it. The Government should not be allowed, through misuse of the grand jury process, so to hamstring the accused.

As To The Second Question Presented

A member of a crime enforcement organization, while not prohibited from serving on a jury, could exhibit such prejudice and bias against the defendant that there would be grounds for a challenge for cause. Moreover, the revelation of membership might prompt the defendant to exercise a peremptory challenge. This right to peremptory challenges, given to defendant by Rule 24(b), Federal Rules of Criminal Procedure, is a means of providing the defendant with the fair and impartial jury guaranteed to him by the Sixth Amendment, and care should be exercised to insure that this right can be employed intelligently. When the trial court exercises its discretion and conducts the *voir dire* without direct assistance of counsel, great pains should be taken to provide counsel an adequate basis for exercising his challenges.

Two other Courts of Appeal, in very similar circumstances, have held that the refusal of the trial judge to allow such a question of the jurors was an abuse of discretion. *Bailey* vs. *United States*, 53 F.2d 982 (5 Cir. 1931); *Beatty* vs. *United States*, 27 F.2d 323 (6 Cir. 1928). In both of those cases, the defendants were being tried for violations of the Prohibition Laws and the requested interrogatories went to involvement with prohibition enforcement societies. It is petitioner's contention that, in essence, our case presents exactly the same basic issue there posed — and that the court below erroneously distinguished the earlier cases by unfairly characterizing the interrogatory here as one aimed at finding out "who is *interested* in law enforcement."

The thrust of the disputed query was not to determine who on the prospective jury panel was "interested" in law enforcement.

Rather, it was to ascertain who among the veniremen had demonstrated what must be considered a somewhat abnormal interest in law enforcement. Most people, regardless of their own law abiding beliefs and tendencies, are content to leave the active tracking and prosecution of violators to local, state and federal authorities — supported as they are by every citizen's tax dollars. Those who go farther than this by actively participating in or monetarily supporting organizations like prosecutors' associations, The National Council on Crime and Delinquency, local crime and delinquency committees, etc., might be suspected, as a group, of being "prosecution minded." Most loyal and intelligent Americans can be described as "anti-communist"; there is in most cases, however, probably a qualitative difference between that antipathy to communist doctrines and sympathizers and that likely to be demonstrated by a rabid member of the John Birch Society. The discovery of just such a difference is exactly what the proffered interrogatory was aimed at.

We urge that while the requested *voir dire* in the two prohibition cases was more narrowly relevant to the issues in those cases, the question refused here was an equally relevant concern of defense counsel. Just as the defense in *Beatty* and *Bailey* were interested in singling out those who had manifested an *abnormal* interest in enforcement of the liquor laws, here the defense attempted merely to obtain the same information as to those who had manifested an *abnormal* interest in all law enforcement. An interest in law enforcement is, of course, laudatory. However, just as a member of the W.C.T.U. would probably have been a less than ideal juror, sterling motives notwithstanding, in a prohibition case — and a John Bircher in a Smith Act prosecution — so too might a member of the F.B.I. Alumni or a contributor to a private organization dedicated to stricter law enforcement have difficulty being impartial in *any criminal* case. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* vs. *Dowd*, 81

S. Ct. 1639, 1642 (June 5, 1961). While the answers to the requested *voir dire* may not have presented the basis of a challenge for cause, it was an important element to be considered by the defense in the use of its peremptory challenges.

The abridgement of the right to peremptory challenge, where granted by statute, is reversible error. *United States* vs. *Shackleford*, 15 How. 588 (1855); *Lewis* vs. *United States*, 146 U.S. 370, 13 S. Ct. 136 (1892); *Gulf etc. R. Co.* vs. *Shaw*, 157 U.S. 348, 15 S. Ct. 341 (1895). The refusal to allow questions of the veniremen which enable the parties to make intelligent use of their peremptory challenges is surely a severe practical abridgement of the statutory right; such abridgement is even more serious when the criminal defendant's jealously guarded right to a scrupulously fair hearing is taken into consideration. The courts have generally recognized that inquiry into germane associations of prospective jurors is proper whether or not the association was such as to warrant a legitimate challenge for cause. *Johnson* vs. *State*, 28 Okla. Crim. 254, 230 Pac. 525 (1924); *Boyle* vs. *People*, 4 Colo. 176 (1878). In the instant case there was not presented any question of unduly prolonging the trial; in refusing to allow a question so calculated to expose possible prejudicial preconceptions and tendencies of prospective jurors, the court erred. A trial court's "broad discretion as to the questions to be asked" on *voir dire* is "subject to the essential demands of fairness." *Aldrich* vs. *United States*, 283 U.S. 308, 310, 51 S. Ct. 470, 471 (1931); Cf. *Sellers* vs. *United States*, 271 F.2d 475 (D.C. Cir. 1959). Such error warrants a new trial.

As To The Third Question Presented

A reading of Judge FRIENDLY's opinion below quickly demonstrates that the issues here involved are not easily susceptible to the "direct and concise" argument called for by this petition. A glance at the statement of the case, however, shows that virtually

the entire case against petitioner was an edifice built of hear-say testimony. The court below held that both the Cohen and Mayhew testimony were admissible under "Professor Morgan's sixth class" — and petitioner does not intend to press these points seriously.

The Richard Terker testimony, though, was crucial to the Government's case. Harry Terker's statement to his son as to his *past* activities, clearly excluded (if alone) by this Court's ruling in *Shepard* vs. *United States*, 290 U.S. 96 (1933), was the *only* evidence in the case that Ammmziato was anything but an unknowing conduit (if, in fact, the envelope contained money); this testimony was obviously extremely damaging and prejudicial.

As to this aspect of the case, petitioner requests the chance to brief and argue at length the following points:

1. The justification for the controversial and oft-criticized *Hillmon* rule.

2. The propriety of the Court of Appeals' cavalier affirmance of the admission of the highly prejudicial "alloy" with the so-called "pure metal."

3. The admissibility of the Richard Terker testimony as statements of a co-conspirator. Here, petitioner's most crucial argument was not even mentioned in the opinion of the court below. It is clear from the evidence that the Cohen and Mayhew conversations took place subsequent to the talk with Richard Terker. Absolutely *no* independent evidence of a conspiracy at the *earlier time* was introduced. It is petitioner's contention that the Richard Terker testimony in this case served the "double duty" forbidden in the conspiracy cases.

4. The facile admission by the Court of Appeals that the requirement that a co-conspirator's statement must be made "in furtherance" of the conspiracy has now reached such a Pickwickian status.

As To The Fourth Question Presented

Although the court below found it unnecessary to reach the question of whether *Campbell* vs. *United States*, 365 U.S. 85 (1961), required the trial court to investigate further the Jencks Act status of the fairly long Haas statement, petitioner contends that the opinion of the *Campbell* majority clearly demands affirmative action, in the interests of justice, on the part of the trial judge.

The Court of Appeals, however, refused to reach the basic question on the strength of its belief that the failure of the defense to see the statement in question could not *possibly* have been prejudicial. The court's reliance on *Rosenberg* vs. *United States*, 360 U.S. 367 (1959), for that holding is, we believe, misdirected.

This Court, in the *Rosenberg* case, held that failure to order production was not prejudicial where defense counsel had obtained the same admission from the witness on cross-examination. The holding in the instant case in effect amounts to the proposition that there was no "material inconsistency" between Haas' two stories. The court in *Jencks*, however, recognizing that trial and appellate judges lacking intimate knowledge of the defendant's case make relatively poor barometers of what is likely to be helpful to the defense, specifically held that the courts were not to pass judgment on the issue of consistency — merely on that of relevancy. The *Rosenberg* opinion did not hedge in any way on this aspect of *Jencks*; the Court held only that a new trial was not warranted where the defense had obtained the same information from the witness. More than merely presenting a problem of prejudicial error, the holding in the instant case resurrects the trial (and/or appellate) court as an intermediate barrier between a criminal defendant and prior statements made by prosecution witnesses; this violates the basic concept behind the decision in *Jencks* — one which was not compromised in *Rosenberg*. Indeed, much more

recently than the decision in *Rosenberg*, this Court has reaffirmed this crucial aspect of its *Jencks* holding.

> "*Whether the statements so relate* to prosecution testimony *is a decision* which is *vested* not in the Government, but *in the trial judge* with full opportunity for appellate review. Once this question has been determined, *whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself.*" (Emphasis added)
>
> *Scales* vs. *United States*, 81 S. Ct. 1469, 1501 (June 5, 1961).

As To The Fifth Question Presented

The Court of Appeals overruled petitioner's contentions on this point because defendant "made no request" for the specific statement in question. The record shows, however, that defendant vigorously sought the handwritten notes taken during the interview with young Terker; that there was a discussion, unrecorded, at the bench; that when it appeared the notes were not available, the defense attempted to have an inference drawn from the destruction of the notes; that the trial court later abruptly cut off the subject from inquiry. See Appendix B to this petition.

This is not a case where counsel went to sleep on the defendant's Jencks Act rights and later attempted belatedly to raise the point. After a somewhat heated exchange on the matter of the notes, the court stepped in and put an end to defendant's quest. Under these circumstances, it is only the "gamesmanship" theory of criminal justice which can punish the accused for counsel's failure to utter the exact talismanic words necessary.

CONCLUSION

1. Each of the questions presented herein poses important questions of federal criminal law which should be decided by this Court.

2. The decision of the Court of Appeals on question (2), concerning the requested *voir dire*, is in conflict with decisions of the Courts of Appeal for the Fifth and Sixth Circuits in *Bailey* vs. *United States*, 53 F.2d 982 (5 Cir. 1931) and *Beatty* vs. *United States*, 27 F.2d 323 (6 Cir. 1928).

3. Although questions of law concerning the admissibility of evidence might not appear, at first blush, worthy of review by this Court, the instant case presents important and far reaching problems which should be settled at this highest level, thereby furnishing uniform rules for all federal trial courts. Among other things, petitioner requests that this Court reevaluate its seventy year old holding in *Mutual Life Insurance Co.* vs. *Hillmon*, 145 U.S. 285 (1892); petitioner contends that part of the holding by the Court of Appeals flies directly in the face of this Court's decision in *Shepard* vs. *United States*, 290 U.S. 96 (1933); and, finally, that the Court of Appeals' alternate holding that certain hearsay testimony was admissible as statements of a so-called co-conspirator presents a clear and dangerous example of growing abuse of the amorphous conspiracy doctrine -- so eloquently pointed out in the concurring opinion by Mr. Justice JACKSON in *Krulewitch* vs. *United States*, 336 U.S. 440, 445 (1949).

4. It is petitioner's contention that the holdings of the Court of Appeals on the "Jencks Act" questions represent grave compromises of both the spirit and letter of this Court's prior decisions in *Jencks* vs. *United States*, 353 U.S. 657 (1957) and *Campbell* vs. *United States*, 365 U.S. 85 (1961).

The writ of certiorari should be granted.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket as No. 26846, "*United States of America, Appellee* vs. *Salvatore Annunziato, Appellant,*" and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated September 8, 1961.

SALVATORE ANNUNZIATO,
Petitioner.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 405 — October Term, 1960.

(Argued June 6, 1961 Decided July 26, 1961.)

Docket No. 26846

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SALVATORE ANNUNZIATO,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

GOODRICH * and FRIENDLY, *Circuit Judges*

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* Of the Third Circuit, sitting by designation.

Appeal from judgment of the District Court for Connecticut, WM. H. TIMBERS, J., convicting defendant, after jury verdict, under indictment for receiving money from an employer in violation of 29 U.S.C. §186(b) and (d). Affirmed.

HOWARD A. JACOBS (Stanley A. Jacobs, Jacobs, Jacobs and Jacobs, on the brief), New Haven, Conn., *for Defendant-Appellant.*

HARRY W. HULTGREN, JR., U. S. Atty. for Dist. of Connecticut, *for Plaintiff-Appellee.*

FRIENDLY *Circuit Judge:*

The trial of this seemingly simple criminal case, involving an alleged violation of 29 U. S. C. §186(b), which at the time made it unlawful "for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value," has raised a host of problems, to the proper solution of which the Government's seven page brief, filed, in violation of our Rule 15 (a), on the eve of the argument, has rendered almost no assistance.

In 1957 the Terry Contracting Company, Inc., a New York City concern, was engaged in constructing the Connecticut Turnpike in Bridgeport, using materials from outside the state. Annunziato was business agent for the International Union of Operating Engineers, members of which were engaged in work on the site. The indictment alleged two violations of 29 U. S. C. §186 (b) by Annunziato—the receipt of $300 on or about July 3, 1957, and the receipt of $50 on or about December 24, 1957. Prior to trial the Government filed an information charging him with the same offense stated in the second count; without objection on his part, Count 2 of the indictment was nolled and Count 1 and the

information were tried together. The jury brought in a verdict of guilty on the former, of not guilty on the latter. The court gave Annunziato the maximum prison sentence, one year, and imposed a fine of $2,500 plus costs of prosecution, 29 U. S. C. §186(d).

The Government's proof on Count 1 was presented primarily through five employees of the Terry company, hereafter Terry, whose testimony can be summarized as follows:

(1) *Walter Haas* was timekeeper on the Bridgeport job, identified as Job No. 719, during June and July, 1957. He worked in a trailer, with a small office at one end, the other end open, and a door between. He first saw Annunziato on an occasion when the latter said "in a very loud voice" to Van Dommellen, the Terry superintendent, and to Frattini (later identified as the master mechanic), that "The job was to be covered—the letter of the contract was to be covered by regarding the handling of all the operating machines whereby the operating local was under their jurisdiction," and that the contract would be enforced "Right to the 'T'." A week or two later Annunziato appeared in the trailer and asked whether Mayhew, Terry's general superintendent who was located in New York, was on the job site. Haas said Mayhew was not but was expected. Mayhew arrived in the office with a Mr. Wolf, chief estimator, also from New York. When Haas saw Annunziato approaching, he left the office. He saw and heard Mayhew attempt to introduce Wolf; Annunziato declined the proffer, saying "This ain't no social call," whereupon Wolf also left the office. Haas then saw Annunziato pick up a small manila envelope from a table in the office.

(2) *Arthur Van Dommellen*, field superintendent of the Bridgeport job, recalled that late in June or early in July, 1957, Annunziato came into the trailer office and asked if someone from New York was there to see him. Van Dommellen answered "There's nobody here now, but I expect Mr. Mayhew later."

Later Annunziato returned; Van Dommellen met him outside the trailer and told him Mayhew and Wolf were in the office if Annunziato wanted to see them. He did.

(3) *William ("Bill") Mayhew* was in general charge of all Terry construction projects. In June, 1957, the president of Terry was Harry Terker, deceased at the time of the trial. Mayhew was permitted to testify over objection that in the summer of 1957, on a day before he was scheduled to make a trip to New Haven, Harry Terker gave him a small manila envelope to deliver to the business agent for the operating engineers at Bridgeport. Mayhew asked the purpose; Harry Terker replied "It's for a commitment that I have made." When Mayhew demurred, Terker said, "Well, I have made the commitment, and I would like to keep up with it, and I would like you to do it, to take it with you, since you are going to New Haven." Arriving at Bridgeport, Mayhew and Wolf entered the trailer office. Annunziato came in and identified himself; Mayhew sought to introduce him to Wolf and proposed going out for a cup of coffee. Annunziato "said that he had not come for a social call; he was not interested in going for coffee." Mayhew handed the small envelope to Annunziato, who put it in his pocket. The envelope was about half an inch thick and flexible.

(4) *Ralph Cohen* was comptroller of Terry. He identified a Cash Voucher dated June 28, 1957, for $300, bearing the name "B. Mayhew" at the top and reading "Job #719, Sundries." It also bore the legend "Receipt of above is hereby acknowledged," with Cohen's initials. If in fact Cohen had given the money to Mayhew, he would have made Mayhew sign the receipt; instead Cohen had put it in an envelope and given it to Harry Terker. Cohen was allowed to testify, over objection, that Harry Terker had told him to draw the petty cash "For Mr. Mayhew's use to pay somebody" on the job.

(5) *Richard Terker*, son of Harry Terker, had been secretary and treasurer of Terry; after his father's death he became president. He was allowed, over objection, to testify to a luncheon conversation with his father late in June or early in July, 1957. The father informed the son "that he had received a call from Mr. Annunziato" and "that he had been requested by Mr. Annunziato for some money on the particular project in question, the Bridgeport Harbor Bridge. I asked him what he intended to do, and he had agreed to send some up to Connecticut for him." Cross-examination developed that the sum of money mentioned was $250.

Annunziato's Appearance Before the Grand Jury.

Appellant's first ground of appeal requires a statement of the proceedings prior to the indictment. Annunziato was summoned before a grand jury, first on September 16 and 17, 1959, and again on May 25, 1960. He claims that on neither occasion was he advised of his right to remain silent under the Fifth Amendment; and contends the indictment should therefore be quashed. We find it unnecessary to consider the legal issue, see *United States* v. *Scully*, 225 F. 2d 113 (2 Cir. 1955), cert. denied 350 U. S. 897 (1955), since the factual premise is wanting. The transcript, which, of course, was not available to defense counsel, shows the prosecutor did advise Annunziato of his right to remain silent before taking him into the grand jury room on September 16, 1959, and on Annunziato's later appearance, he claimed the privilege with the very first question asked and repeated the claim, sustained by Judge ANDERSON when Annunziato was later taken before him, with every question that could possibly be incriminating.

Voir Dire of the Panel.

Moving to the trial, appellant criticizes the court's refusal, on the *voir dire* of the panel, to put a question, requested by him,

whether any of the panel were members of or contributors to any organization having law enforcement as its object. He relies on *Beatty* v. *United States*, 27 F. 2d 323 (6 Cir. 1928) and *Bailey* v. *United States*, 53 F. 2d 982 (5 Cir. 1931), holding that defendants accused of operating stills during the prohibition era should have been allowed to inquire into membership of veniremen in a prohibition enforcement society, since an affirmative answer would have supplied information permitting more effective use of peremptory challenges. We are not required to determine whether or not we would follow those cases if the question which the judge here refused to put had dealt with a special interest of the veniremen in enforcing the particular type of law under which the defendant had been indicted; Annunziato cast his net too wide. The petit criminal jury has, of course, moved from its historic origins, 2 Pollock & Maitland, History of English Law, 644-656; Plucknett, A Concise History of the Common Law, 120-129, but hardly so far that government owes a defendant charged with crime an opportunity to discover whether a prospective juror has the general interest in law enforcement which is every citizen's responsibility.

Hearsay Objections.

Our statement of the evidence has surely presaged another and more serious set of attacks — alleged violations of the hearsay rule. Appellant asserts this with respect to Mayhew's testimony that Harry Terker asked him to take the money to Bridgeport in order to keep a commitment that Terker had made to Annunziato, to Cohen's testimony that Harry Terker told him to draw $300 "For Mr. Mayhew's use to pay somebody" on the Bridgeport job, and, most importantly, to Richard Terker's account of his luncheon talk with his father.

We need not tarry long over the first two statements. These fall so clearly within Professor Morgan's sixth class, "Cases in

which the utterance is contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it." A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L. J. 229, 236 (1922), see *Beaver* v. *Taylor*, 1 Wall. 637, 642 (1863); *Lewis* v. *Burns*, 106 Calif. 381, 39 P. 778 (1895); *Shapiro* v. *United States*, 166 F. 2d 240, 242 (2 Cir. 1948), cert. denied 334 U. S. 859 (1948); McCormick, Evidence (1954), pp. 586-587, that we do not need here to consider other possible grounds of admissibility.

Richard Terker's account seems to have been admitted on the basis that his father's luncheon statement was a declaration of a co-conspirator; the Government now seeks to sustain admissibility both on that ground and as a declaration of the father's intention. We think it was admissible on both grounds.

If the manila envelope had popped out of Harry Terker's wallet as he was settling the luncheon check and Harry had told Richard "This is money I'm sending up to Annunziato," admissibility would clearly follow from the combination, logically unassailable although practically debatable, of two principles, "that the existence of a *design* or *plan to do* a specific act is relevant to show that the act was probably done as planned" and that the plan or design may be evidenced, under an exception to the hearsay rule, "by the *person's own statements* as to its existence." 6 Wigmore, Evidence (3d ed.), pp. 79-80; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 295 (1892). The question is whether a different result is demanded because here the declarant accompanied his statement of future plan with an altogether natural explanation of the reason, in the very recent past, that had prompted it.

We do not think such nicety is demanded either by good sense or by authority. *State* v. *Farnam*, 82 Ore. 211, 161 P. 417 (1916); *People* v. *Alcalde*, 24 Cal. 2d 177, 148 P. 2d 627 (1944). As Professor Morgan has pointed out, Basic Problems of Evidence (1954), p. 293, the famous letter from Walters, oral evidence of which was held admissible in the *Hillmon* case, was

actually a declaration of Walters' intention not simply to travel to Colorado but to travel with Hillmon, and the inference the jury would almost certainly draw was that this represented a previous arrangement between them.[1] *Shepard* v. *United States*, 290 U. S. 96, 103-106 (1933), does not hold that a declaration of design is rendered inadmissible because it embodies a statement why the design was conceived. In that case there was no relevant declaration of design; the statement, "Dr. Shepard has poisoned me," was wholly of past fact and was offered and received as a dying declaration, erroneously as the Supreme Court held. In Mr. Justice CARDOZO's words, the Government "did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past * * * the testimony * * * faced backward and not forward * * * at least * * * in its most obvious implications." Here the "most obvious implications" of Harry Terker's statement looked forward — he was going to send money to Bridgeport. To say that this portion of his statement is sufficiently trustworthy for the jury to consider without confrontation, but that his reference to the telephone call from Annunziato which produced the decision to send the money is not, would truly be swallowing the camel and straining at the gnat. The "vigorous leap" with respect to the hearsay exception for declarations of state of mind was taken when this was extended from cases where "it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions," *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154, 251 (1876), as to which the declaration may well be the most reliable evidence attainable, to cases where the state of mind is relevant only to prove other action, where it surely is not. See Maguire, The Hillmon Case—Thirty-Three Years After, 38 Harv. L. Rev. 709,

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[1] Professor Morgan may overstate this slightly when he says "that to draw the inference that Walters went with Hillmon required an assumption that he had made an arrangement with Hillmon" before Walters wrote the letter.

714 (1925); Hutchins and Slesinger, State of Mind to Prove an Act, 38 Yale L. J. 283, 284-288 (1929). True, inclusion of a past event motivating the plan adds the hazards of defective perception and memory to that of prevarication, but this does not demand exclusion or even excision, at least when, as here, the event is recent, is within the personal knowledge of the declarant and is so integrally included in the declaration of design as to make it unlikely in the last degree that the latter would be true and the former false.[2] True also, the statement of the past event would not be admitted if it stood alone, as the *Shepard* case holds, but this would not be the only hearsay exception where the pure metal may carry some alloy along with it. Sec. 5 Wigmore, Evidence (3d ed.), §1405, and cases cited, and American Law Institute, Model Code of Evidence, Rule 509(2), for the application of such a principle under the hearsay exception for statements of fact against interest—an exception that would itself be applicable here but for the rather indefensible limitation that it does not relate to

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[2] The nigh impossibility of disentangling statements of plan from reasons underlying them, and the artificiality of any attempt to do so, are well illustrated by some of the decedent Whittall's statements held admissible on the issue of paternity in the celebrated case of *Lloyd* v. *Powell Duffryn Steam Coal Co.*, [1914] A. C. 733, 734. Among the statements were "that Alice Lloyd had told him some things that troubled him very much but that it didn't matter because he would marry her soon enough," and that "he was afraid Miss Lloyd was in trouble—it was a case of getting married." Whittall's declarations of design were admitted not, as in the *Hillmon* case, to prove a future act, which, indeed, Whittal admittedly never performed, but to establish a past occurrence inferably motivating the design. Perhaps, as shown in Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 210-212 (1948), their lordships' judgments are not very humorous, but at least no one suggested that Whittall's statements must be split down the middle so as to exclude what Alice had told him and admit only the rest.

statements only against penal interest, see Wigmore, §1476, American Law Institute, Model Code of Evidence, Rule 509(1).

The alternative ground for admissibility is as a statement by a co-conspirator. Appellant properly makes no point that the indictment did not charge a conspiracy; it is enough if evidence, other than that whose admissibility is under challenge, disclosed one. *St. Clair* v. *United States*, 154 U. S. 134, 149 (1894); *United States* vs. *Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945); *People* v. *Luciano*, 277 N. Y. 348, 14 N. E. 2d 433 (1938). The serious questions are whether Annunziato and Harry Terker had the sort of common purpose that makes certain declarations of one admissible against the other and, if so, whether Terker's declaration was of the sort that falls within that rule.

It is quite true that mere yielding to the commission of a crime against one's self does not render a complying person a co-conspirator. Thus a woman who simply consents to be transported across a state line for the purpose of engaging in sexual intercourse is not a co-conspirator to violate the Mann Act, 18 U. S. C. §§2421 *et seq.*, *Gebardi* v. *United States*, 287 U. S. 112 (1932), and, as there stated, p. 123, "It is not to be supposed that the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would render the former an abettor or a conspirator, compare *In re Cooper*, 162 Cal. 81, 85; 121 Pac. 318, or that the acquiescence of a woman under the age of consent would make her a co-conspirator with the man to commit statutory rape upon herself. Compare *Queen* v. *Tyrrell*, [1894] 1 Q. B. 710." We assume the same would be true of one whose sole role was that of a victim of extortion. The rationale of this is that when the legislature has imposed criminal penalties to protect a class of persons, it can hardly have meant that a member of that very class should

be punishable either as an aider or abettor or as a co-conspirator.[3] In contrast, a person making a payment to a United States officer for services in relation to a matter in which the United States is interested, receipt of which 18 U. S. C. §281 forbids, may be found guilty of conspiring with the officer receiving the payment. *May* v. *United States*, 175 F. 2d 904, 1004-1005 (D. C. Cir. 1949), cert. denied 338 U. S. 830 (1949).

Determining which of these lines of authority is the more relevant here requires some analysis of the purpose of 29 U. S. C. §186. This came into the statutes as §302 of the Taft-Hartley Act of 1947, 61 Stat. 136, 157. Section 302(a) made it "unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce." Section 302(b), previously quoted, made it similarly unlawful "for any representative of any employees" to "receive or accept" from an employer. Section 302(c) is an elaborate series of exceptions, including carefully circumscribed ones with respect to welfare funds. These provisions existed only in very sketchy form in the Hartley bill passed by the House of Representatives, 80th Cong. 1st Sess., H. R. 3020, §8(a)(2)(B) and (C); the Senate removed the provisions from §8, elaborated them, and imposed criminal sanctions, §302(d), as well as opening the federal courts to civil suits to restrain their violation, §302(e). Most of the discussion centered around welfare funds.

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[3] At least this explains the results under the Mann Act, in statutory rape, and, as we assume, in extortion; it would scarcely seem to do so with respect to adultery. However, as to that, "It is well known that the public policy of the several States differs as to criminal liability for adultery, and where a legislature has made plain its intent upon that question, prosecutors should not be permitted to circumvent that decision." *May* v. *United States*, 175 F. 2d 904, 1005 (D. C. Cir. 1949), cert. denied 338 U. S. 830 (1949).

Senator Ball, a majority member of the Labor Committee, declared the purpose to be that these should be "used actually for the specified benefits to the employees of the employers who contribute to them and that they shall not degenerate into bribes," 93 Cong. Rec. 4805; Senator Taft, speaking to §302(a), said "That is, it may be said, in a case of extortion or a case where the union representative is shaking down the employer." 93 Cong. Rec. 4876.

Decisions have recognized that §302(a) and (b) have this dual purpose—of protecting employers against extortion and of insuring honest representation to employees. Judge Learned Hand said, dissenting in *United States* v. *Ryan*, 225 F. 2d 417, 426 (2 Cir. 1955), revd. 350 U. S. 299 (1956), conviction affirmed on remand, 232 F. 2d 481 (2 Cir. 1956), "Congress wished to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers." Other circuits have stated that "The Taft-Hartley offense is in the nature of bribery," *Bianchi* v. *United States*, 219 F. 2d 182, 193 (8 Cir. 1955), cert. denied 349 U. S. 915 (1955), and that "The statute is not limited in its thrust to cases of extortion * * * Congress wished to assure collective bargaining at arms length." *Arroyo* v. *United States*, 256 F. 2d 549, 551-552 (1 Cir. 1958), revd. on other grounds, 359 U. S. 419 (1959).

We think it follows that an employer who makes or agrees to make a payment to an employee representative forbidden by §302(b) is engaged in a criminal enterprise jointly with the recipient. He is not simply and solely a member of the class whom the statute aims to protect; he is likewise a member of a class whose activities the statute aims to curb. The same act which constitutes an offense by the employee under §302(b) is also one by the employer under §302(a)—indeed, "An employer might be guilty under subsection (a) if he paid money to a representative of employees even though the latter had no intention of

accepting." *Arroyo* v. *United States*, 359 U. S. at 423-424. Harry Terker was thus a co-conspirator.[4]

That, however, is not the end of the problem. For although establishing the foregoing affords an added ground for the admissibility of Harry Terker's declarations to Mayhew and Cohen, both plainly in "furtherance" of the conspiracy, it may not with respect to Harry's declaration to Richard, whose immediate role was that of an auditor, not an actor. In *Van Riper* v. *United States*, 13 F. 2d 961, 967 (2 Cir. 1926), we said that "merely narrative declarations [of a conspirator] are not competent," and and in *United States* v. *Goodman*, 129 F. 2d 1009, 1013 (2 Cir. 1942), we held it error to have admitted what "were merely narrative declarations of a past fact," even though made while the conspiracy was continuing. See *United States* v. *Compagna*, 146 F. 2d 524, 530 (2 Cir. 1944); cert. denied 324 U. S. 867 (1945); *United States* v. *Puglisi*, *supra*, at 500. In contrast, the Seventh Circuit construes the expression "in furtherance of the conspiracy" as referring "not to the *admission* as such, but rather to the *act* concerning which the admission or declaration is made," *International Indemnity Co.* v. *Lehman*, 28 F. 2d 1, 4 (1928), cert. denied 278 U. S. 648 (1928), a ruling which Morgan has characterized as "employing a time-honored judicial device to

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[4] We do not think it necessary to decide whether if Annunziato and Harry Terker had been the only persons here involved, the "Wharton rule" would have prevented prosecution for conspiracy, see Note, Developments—Conspiracy, 72 Harv. L. Rev. 920, 953-956 (1959), or, if it would, whether that would make the declaration of one participant inadmissible against another. We cannot see why the latter should be so; the basis of admissibility is a joint enterprise, whether technically a "conspiracy" or not, see American Law Institute, Model Code of Evidence, Rule 508(b). In any event the Wharton rule would not be applicable here, since at least two persons other than the payor and the receiver, namely, Mayhew and Cohen, knowingly participated in the criminal enterprise.

make new law without appearing to neglect, much less to abuse, the doctrine of stare decisis." Admissions, 12 Wash. L. Rev. 181 (1937) in A. A. L. S. Selected Writings on Evidence and Trial (1957), 825, 835; and such an extension of the rule is proposed in the American Law Institute's Model Code of Evidence, Rule 508(b), and approved by Professor McCormick, Evidence (1954 ed.), pp. 522-523. See Note, Developments-Conspiracy, 72 Harv. L. Rev. 920, 985-986 (1959). We think Harry Terker's statement to his son was admissible even under the historic view of this Circuit. The statement was not a "merely narrative declaration of a past fact." Even the instant payment to Annunziato lay in the future; moreover, it might well have been important to Harry's objectives that his son, then secretary-treasurer and later president of the company, should know of his father's policy if questions should ever arise or if a similar problem with respect to Annunziato should be presented in the future.

To round out this discussion we add there was ample evidence, other than Harry's statement to Richard, to show the common plan; the judge needed only enough "to decide whether, if the jury chose to believe the witnesses," Harry Terker and Annunziato were engaged in one, *United States* v. *Pugliese, supra*, at 500.

Jencks Act and Grand Jury Minutes

This case furnishes further proof, if any were needed, of the prophetic truth of Mr. Justice Frankfurter's observation concerning 18 U. S. C. §3500, "The possible permutations of fact and circumstances are myriad." *Palermo* v. *United States*, 360 U. S. 343, 353 (1959).

(1) The witness Haas had been twice interviewed by the Government, on September 24, 1958, and shortly before the trial in the fall of 1960. On the latter occasion he signed a three page statement, which was delivered to the defense. It is unques-

tioned that at his first interview he did not sign or otherwise adopt or approve any statement; the controversy is whether an Interview Report dictated by F.B.I. Special Agent Clemente on September 25, 1958, the day after the interview, and forwarded under date of September 29, came within §3500(e)(2).

The Interview Report, of slightly more than three single-spaced typewritten pages and some 800 words, was turned over to the judge, who permitted defense counsel to examine Haas in regard to it in the absence of the jury. Haas testified that at the September 24 interview the F.B.I. agent made notes; that the interview "possibly" lasted about three hours; and that on his 1960 interview he was not shown either the notes made in September, 1958, or the Interview Report, although the agents had "certain papers in front of them" to which they referred. Defense counsel made no request for the calling of Agent Clemente. The judge announced he would adhere to a ruling, made prior to the detailed examination of Haas, that, under the *Palermo* decision, the Interview Report need not be produced.

Examination of the Interview Report in the light of the testimony does not leave us with a clear conviction whether or not the report came within §3500(e)(2), see *United States* v. *McKeever*, 271 F. 2d 669, 673-675 (2 Cir. 1959). On the one hand, "the statute was meant to encompass more than mere automatic reproductions of oral statements"; on the other, "summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions." 360 U. S. at 352-353. Here the agent did have notes, how complete we do not know, and the Interview Report at least purports to be solely a statement of what Haas said. Selective it must have been if the interview in fact had lasted about three hours; hence, even though

the word-time ratio is slightly higher than in *Palermo*, 360 U. S. at 355, fn. 12, it is hardly "a substantially verbatim recital of an oral statement" if that requires not only correctness but a completeness that would include the immaterial and the trivial as well as the pertinent. The obvious way to help resolve these doubts would have been to call Agent Clemente, at least if he was available, *Campbell* v. *United States*, 365 U. S. 85 (1961).

Whether the *Campbell* decision means that, under circumstances such as here presented, the judge was required to ascertain the availability of the F.B.I. agent and require his production if available, even though, in contrast to *Campbell*, 365 U. S. at 94, this was not even suggested by defense counsel, is a serious question—perhaps he might be since, as it is all too easy to forget, the judge had a knowledge of the nature of the Interview Report which defense counsel did not. We do not feel called upon to resolve that issue here. Careful scrutiny of the Interview Report convinces us that on no basis could it have assisted the defense.

convinces us that on no basis could it have assisted the defense.

Both the majority and the minority opinions in *Rosenberg* v. *United States*, 360 U. S. 367, 371, 375 (1959), spurn the extreme view "that the harmless error doctrine can never apply as to statements producible under the statute, see *Bergman* v. *United States*, 253 F. 2d 933; *United States* v. *Prince*, 264 F. 2d 850." [5] Even taking as our test the presumably more rigid standard laid down by the minority in *Rosenberg*, pp. 375-376, that we must remand "unless the circumstances justify the conclusion that a

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[5] In the light of this ruling by the Supreme Court, we have no occasion to consider whether there is a sufficient basis for distinguishing, as regards 28 U. S. C. §2111, error in the denial of a statement producible under the Jencks Act from error in a failure of the judge to read the minutes of grand jury testimony of a government witness and to make available to the defense any portions containing inconsistencies, or the different views as to the latter that have been expressed by judges of this Court, see *United States* v. *Giampa*, —— F. 2d —— (1961) and *United States* v. *Hernandez* (on petition for rehearing), —— F. 2d —— (1961).

finding that such a denial [of a statement producible under §3500] was harmful error would be clearly erroneous," we answer that here it would be, fully recognizing, as we say this, the caution that "appellate courts should be hesitant to take it upon themselves to decide that the defense could not have effectually utilized a producible statement." The Interview Report checks fully with Haas' trial testimony. Had we been defense counsel, we would have bitterly regretted receiving it, since its production would have presented the dilemma, which trial lawyers strive desperately to avoid, that examination on the report would only reinforce the witness' testimony whereas failure to use it would do the same. Beyond this, Haas' testimony as to the delivery of the envelope was corroborated both by Mayhew, whose testimony was even more direct, and, in some degree, by Van Dommelen. Applying the test of harmless error, 28 U. S. C. §2111, laid down in *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946), we pronounce this to have been such, *Karp* v. *United States*, 277 F. 2d 843, 849 (8 Cir. 1960), cert. denied 364 U. S. 842 (1960)—if error it was.

(2) Richard Terker testified he was first interviewed by the F.B.I. in the fall of 1958. The interview lasted "About two, two and a half hours," the agents made longhand notes, and Richard looked at them at the end of the interrogation. To the question whether the notes were accurate and correct, he answered "I would imagine so, yes." When defense counsel asked for production of the notes, the prosecutor responded, "I have no notes, your Honor, by the term 'longhand notes' as alluded to in this testimony. We do have, as has been developed in the testimony of other witnesses, the F.B.I. memorandum of the interview." Defense counsel then gave "notice * * * to produce the longhand notes that were taken on questioning the witness, and the witness read over and consented to"; the judge noted the prosecutor's statement "that no such notes are in his possession." There fol-

lowed a conference at the bench, as to the content of which the transcript does not inform us.

Terker's testimony created at least a prima facie case that the longhand notes were "a written statement * * * otherwise adopted or approved by him" within §3500(e)(1). Hence, if defendant had sought the memorandum of the interview mentioned by the prosecutor, he should have been given it for use as secondary evidence of the contents of the destroyed notes, see *United States* v. *Thomas*, 282 F. 2d 191, 193-195 (2 Cir. 1960), or perhaps, if facts elicited on an inquiry warranted, as independently producible under §3500(e)(2). However, defendant made no such request and the point is thus foreclosed.

(3) Richard Terker had testified briefly before the grand jury on May 25, 1960. At defendant's request the judge examined the minutes of this testimony for possible inconsistencies, in accordance with the procedure directed in *United States* v. *Spangelet*, 2d 661, 666 (2 Cir. 1959); and *United States* v. *Hernandez*, 282 F. 2d 71 (2 Cir. 1960), on rehearing, —— F. 2d —— (2 Cir. 1961). Finding no inconsistencies, he declined to make the minutes available to the defense. We have reviewed the minutes and likewise find none.

Affirmed.

APPENDIX B

Cross-examination by MR. JACOBS:

Q. Mr. Terker, did you ever sign any statements for the Government in connection with this case? A. I don't believe so.

Q. When were you first questioned by the Government in connection with this case? A. Oh, I'd say about two years ago.

Q. Where would that take place? A. First time was in the office, in our office.

Q. That's about the fall of the year 1958? A. I would place it somewhere around there.

Q. Who questioned you about it, sir? A. There were two Federal agents, Federal Bureau of Investigation agents.

Q. How much time did they spend with you? A. About two, two and a half hours.

Q. Did they make notes while you were talking? A. Yes.

Q. Did you ever have occasion to look over those notes, Mr. Terker? A. Yes.

Q. When was that, sir? A. At the conclusion of the investigation — or questioning.

Q. On that particular occasion? A. Yes. It was longhand notes.

Q. Yes. Were those notes accurate and correct, so far as you know, sir, on looking them over? A. I would imagine so, yes.

Q. Sure.

Mr. Jacobs: Will you produce those notes, Mr. McDonald?

Mr. McDonald: There are no notes, your Honor, by the term "longhand notes" as a to in this testimony. We do have, as has been developed ive testimony of other witnesses, the F.B.I. memorandum of thed terview. he

Mr. Jacobs: I hereby give you notice to produce the in- hand notes that were taken on questioning the witness, an witness read over and consented to. g-

The Court: Well, you have made that request, Mr. Jahe of the Government, and Mr. McDonald, acting for the Gc ment in the presence of the jury, has informed you that nbs, notes are in his possession. rn-

Mr. McDonald: Your Honor, may I approach the bch

The Court: right.

(Discussion at t ench) h?

* * * * * *

Mr. McDONALD: Your Honor, with reference to the Federal Bureau of Investigation notes referred to in the cross-examination, I have ascertained that those notes are no longer in existence.

Mr. JACOBS: Well, I would like that to appear on the record before the jury, that these are not in existence, so that I can claim an inference from that.

Mr. McDONALD: I don't know what inference can be drawn from that, your Honor.

Mr. JACOBS: The inference that can be drawn from that is that evidence in the particular case is no longer available, and it has been destroyed by apparently someone on the Government's side. I claim this would be a proper inference for the jury to consider in this particular case, the reason for the non-availability of this particular evidence has been destroyed, or is not available for other reasons.

It would be the same thing as if we had a civil action here, your Honor. Certain notes were made at a certain time, and then destroyed by a particular party to the act.

Mr. HULTGREN: If your Honor —

Mr. JACOBS: Just let me finish.

Or one of the representatives, then I take it the jury is entitled to consider and draw from that an inference which they can consider as part of the entire case.

Mr. HULTGREN: If your Honor please, what Mr. Jacobs is saying is that the inference can be drawn that we are hiding something that will show his innocence, and the jury can draw that inference. Those notes were destroyed in the usual course of business by the F.B.I., and made into an oral report by the agent, and they were destroyed at the time of the interview, not yesterday, or due to this trial.

Also, it casts a reflection upon our office. I submit to the Court that if there was anything helpful to the accused in our case, like that, we would bring it forward. And, I submit, no infer-

ence should be drawn from the fact that those notes were destroyed.

The COURT: I think it is fair that that statement by Mr. McDonald be made on the record with the jury present, since there was an interchange between Mr. Jacobs and Mr. McDonald with respect to the existence of those notes. But I think that is all that is necessary to be said at this time in the presence of the jury.

The Court will order that there be no argument or interchange between counsel in the presence of the jury with respect to what inferences they can or cannot draw from that fact.

Counsel on both sides are aware of their rights as to producing evidence, calling upon witnesses, to establish whatever they may wish to establish, but all that I am concerned with now, with the witness on the stand, is that a request was made by Mr. Jacobs of Mr. McDonald for notes, if there are any, which this witness referred to in his testimony.

Mr. McDonald said before the recess, as I recall, that he did not have the notes in his possession, did not have them here. He has now further stated that his investigation has established that the notes are no longer in existence, and I will permit Mr. McDonald to state that before the jury. I suggest there be no further argument between counsel on that in the presence of the jury.

We have taken evidence. Now, whatever argument you wish to make should be reserved to the end of the case.

In the meantime, counsel on either side can take whatever steps they wish to take with respect to producing evidence on this subject, or any other subject.

Mr. JACOBS: Well, I hadn't intended to say anything about that now, your Honor, but I just want to understand, because I may mention it in my final argument, that is, at the close of the case, if we get that far. I am wondering if your Honor's ruling — does it in fact foreclose me from mentioning this in final argument, or is that something left open, your Honor?

The COURT: I am not ruling on that now. All I meant was, this is not the time to argue the case, Mr. Jacobs.

Mr. MCDONALD: Your Honor, it appears to me that before this should come in, in the presence of the jury, it ought to be established that Mr. Jacobs has a right to see these notes under 3500. I don't think that has been established as yet.

Mr. JACOBS: I thought that the testimony of the witness was that after the conclusion of that interview that occurred, I believe it was in the fall of 1958, that he remembers he read over these notes, and they accurately represented what he told the Government agent.

And so that I claim that they were an accurate transcription of what he said, and he had read them over, and approved them, and adopted them. That's the theory on which I claim them.

The COURT: Well, I think you are going much further, Mr. Jacobs, than the testimony of the witness went. At least, according to my notes, whatever they are worth, on your cross-examination of this witness, Mr. Terker testified that he was first questioned by the F.B.I. agents about two years ago, the fall of 1958, and he looked over the notes of that interview, made during that first interview, that is, he looked over the notes at the end of that interview, as I understand it.

I don't recall any testimony that he said he adopted them or —

Mr. JACOBS: No, no. I say, it seems to me that he went further than that, if my recollection of the testimony is correct, that he looked them over, and that they were accurate notes of what he said there.

Now, I don't say he says he has adopted them; I say by doing what he did, in fact did, he did adopt them.

The COURT: Well, that, again, is a matter of argument. This witness is still here under cross-examination by you. As I told you just before the noon recess, I will permit you to cross-examine this witness, or any other witness, with respect to conversations or interviews with representatives of the Government, and with

respect to his examination of any memoranda, records, notes, and so forth, of those interviews. I further think directing myself to Mr. McDonald, that it's not necessary for the Court to rule at this time whether this is a statement in the purview of Section 3500.

Whether it is or not, I think counsel is entitled to develop on cross-examination what, if anything, this witness has utilized to refresh his recollection to testify here, or to refresh his recollection in connection with the various conferences he had with various representatives of the F.B.I.

Mr. McDONALD: If he did so, your Honor.

The COURT: If he did so — the request by the defendant to the Government for the production of a statement under Section 3500 has been with reference to these notes, and the request having been made and response by the Government having been made, as appears in the record, the only further thing that I think the record should show in the presence of the jury is the statement that you just made.

And with that, I think that subject should be dropped.

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No. 404

In the Supreme Court of the United States

OCTOBER TERM, 1961

SALVATORE ANNUNZIATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R.[1] 149–167; Pet. App. 3–20) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1961 (R. 168). A petition for rehearing (R. 170–174) was denied on August 14, 1961 (R. 176). The petition for a writ of certiorari was filed on September 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the printed record, consisting of the appendices to the parties' briefs in the court of appeals and the proceedings in that court.

QUESTIONS PRESENTED

1. Whether a witness before a grand jury who was warned of, and exercised, his right not to incriminate himself is entitled to dismissal of an indictment later returned against him because he was not told that he was an object of the grand jury's investigation.

2. Whether a trial judge may in his discretion decline to inquire, on *voir dire* examination of the jury panel, whether any members of the panel are members of or contributors to any organization having law enforcement as an object.

3. Whether inadmissible hearsay testimony was received at the trial.

4. Whether it was error for the trial judge, in determining whether an F.B.I. agent's 800-word report of a three-hour interview with a government witness, which the witness never saw or adopted, was producible under 18 U.S.C. 3500, to fail to call the agent who wrote the report for examination as to the circumstances of its preparation; and whether, in any event, the failure to call the agent was prejudicial in this case.

5. Whether a defendant can complain on appeal of the failure of the trial judge to order delivered to him a document which does not appear to have been producible under 18 U.S.C. 3500 and for which he never asked.

STATUTES INVOLVED

Section 186 of Title 29 of the United State
provided in pertinent part at the time of the
involved (July 3, 1957):[2]

> (a) It shall be unlawful for any emp
> pay or deliver, or to agree to pay or
> any money or other thing of value to a
> resentative of any of his employees v
> employed in an industry affecting comm
>
> (b) It shall be unlawful for any rep
> tive of any employees who are employe
> industry affecting commerce to receiv
> cept, or to agree to receive or accept, f
> employer of such employees any m
> other thing of value.
>
> * * * *
>
> (d) Any person who willfully viola
> of the provisions of this section shall, u
> viction thereof, be guilty of a misdemea
> be subject to a fine of not more than $1
> to imprisonment for not more than one
> both.
>
> * * * *

Section 3500 of Title 18 of the United Sta
provides in pertinent part:

> * * * *
>
> (b) After a witness called by the
> States has testified on direct examina
> court shall, on motion of the defendan
> the United States to produce any state
> hereinafter defined) of the witness in

[2] The section was subsequently amended (in respect
material) by the Labor-Management Reporting and
Act of 1959, 73 Stat. 519, 537.

session of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

Count 1 of a two-count indictment, returned May 25, 1960 in the United States District Court for the District of Connecticut, charged petitioner with having received $300 on or about July 3, 1957 from the Terry Contracting Company (a firm whose employees he represented), in violation of 29 U.S.C. 186 (b) and (d), *supra* (R. 1; Pet. App. 4). Count 2, which charged the receipt to a separate payment, was dismissed pursuant to a *nolle prosequi* and is no

longer involved.[3] Following a trial by jury, petitioner was found guilty (R. 143). He was sentenced to one year's imprisonment and to pay a fine of $2,500 and the costs of the prosecution (R. 2). The Court of Appeals for the Second Circuit affirmed (R. 149–168; Pet. App. 3–20).

The evidence adduced by the government may be summarized as follows:

In 1957 the Terry Contracting Company, a New York City concern, was engaged in constructing the Bridgeport Harbor Bridge, part of the Connecticut Turnpike (R. 3–4, 34, 39–40, 45). Petitioner was business agent for a local of the International Union of Operating Engineers, members of which were engaged in work on the site (R. 35–36).

On or about July 3, 1957, at about 11 a.m., petitioner went to the office of the timekeeper for the bridge-construction project, located in a trailer, and inquired of the timekeeper, Walter Haas, and the job superintendent, Arthur Van Dommellen, whether "someone from New York was there to see him" (R. 3–4, 7, 34, 37). Van Dommellen told petitioner that no one from New York was there then, but that he "expect[ed] Mr. Mayhew later" (R. 37). William Mayhew, to whom Van Dommellen referred, was the Terry Company's chief engineer, in general charge of all its

[3] Prior to trial the government filed an information charging petitioner with the same offense stated in count 2 of the indictment. Without objection, count 2 of the indictment was dismissed and count 1 and the information were tried together. The jury acquitted petitioner of the charge contained in the information (R. 1; Pet. App. 4–5).

construction projects (R. 39–40). Petitioner told Van Dommellen that he would "wander around" and "be back" (R. 37).

A short while later, Mayhew arrived at the construction site with Philip Wolf, the chief estimator for the Terry Company (R. 7, 33, 41). Petitioner, returning to the office, was told by Van Dommellen that "Mr. Mayhew and Mr. Wolf were in the office, if he wanted to see them" (R. 37). Petitioner entered the office and introduced himself to Mayhew (R. 41–42). Mayhew "attempted to introduce" petitioner to Wolf and invited him to a diner for a cup of coffee. Petitioner declined, saying that he was "not interested in * * * coffee" and that "This ain't no social call" (R. 8–9, 42). Mayhew, accordingly, attended promptly to "the business [he] had with him" (R. 42)—the delivery of a sealed, three-by-five-inch, manila envelope which the president of the Terry Company, Harry Terker, had given to Mayhew in New York on the previous day with the request that he deliver it to petitioner (R. 8–9, 42–46, 99). Although Mayhew had not seen the contents of the envelope, he could tell from its "bulk" that it had "something in" it, between three-eighths of an inch and half an inch thick, which could be "flex[ed]" (R. 44–45, 47). Petitioner took the envelope and left (R. 43).

Mayhew testified that Harry Terker, who was deceased at the time of the trial (R. 47), gave him the envelope in the company's New York offices with the request that he deliver it to "the business agent for the operating engineers" on the Bridgeport project (R. 45, 99). Terker, in response to Mayhew's inquiry

as to the purpose of the envelope, said that it was "for a commitment that [he had] made." Mayhew told Terker he "prefer[red] not to carry the envelope", but agreed to do so when Terker persisted in his request (R. 99).

Ralph Cohen, comptroller of the Terry Company, identified a cash voucher for $300, dated June 28, 1957, bearing Mayhew's name and the notation "Job No. 719, Sundries" (R. 55–56, 59–61). The voucher was in Cohen's handwriting and was a company record, kept in the regular course of business (R. 59). Cohen identified "Job No. 719" as the Bridgeport Harbor Bridge project (R. 61). The voucher bore the further notation "Receipt of the above is hereby acknowledged", followed by Cohen's initials (R. 61). The document evidenced on its face, Cohen testified, that $300 in company funds had been given to Mayhew to enable Mayhew "to pay a sundry expense on the job", which, to Cohen's knowledge, meant "a payment to somebody for some purpose" (R. 61–62, 64). Cohen did not deliver the money to Mayhew directly, Cohen testified, since if he had done so he would have required Mayhew to sign the voucher, and Mayhew had not signed it (R. 65). Rather, Cohen testified, he put the money in an envelope and gave it to Harry Terker, the president, whom Cohen did not always require to sign the voucher in such instances (R. 65, 69). Cohen further testified that Terker had told him that the purpose of the $300 was "[f]or Mr. Mayhew's use to pay somebody * * * on the job" (R. 71).

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Richard Terker, the secretary-treasurer of the Terry Company at the time of the offense and the son of Harry Terker (R. 77), testified to a luncheon conversation he had with his father in the latter part of June or the early part of July 1957 in which his father told him that petitioner had asked him for money in connection with the Bridgeport Harbor Bridge project and that he had agreed to send petitioner some (R. 80). The sum mentioned by his father, Richard testified, was $250 (R. 84).

No evidence was adduced on behalf of the defense.

ARGUMENT

1. Petitioner contends (Pet. 7–9) that the trial court erred in refusing to dismiss the indictment on the ground that when he was called before the grand jury he was a "de facto" defendant, "[m]arked for prosecution", but was not so advised. Assuming *arguendo* that he was a target of the grand jury inquiry, there is no merit to the contention.

As pointed out by the court of appeals (R. 153; Pet. App. 7), and as petitioner now concedes (Pet. 7), he was advised of his right to remain silent before he was taken into the grand jury room on his first appearance before that body, and on his second and final appearance he claimed his privilege against self-incrimination with the first question and repeated the claim with every question that could possibly be incriminating. His rights as a witness who was himself an object of the grand jury's investigation were thus

fully protected.[4] There was no need for the government attorney to expand his warning by stating explicitly that petitioner was under investigation, since the warning as worded carried this reasonable implication. This is not a case, moreover, in which the grand jury testimony of a witness, against whom an indictment is subsequently returned, is used or sought to be used against him at his trial. Cf. *United States* v. *Keenan*, 267 F. 2d 118, 126 (C.A. 7), certiorari denied, 361 U.S. 863; *Costello* v. *United States*, 255 F. 2d 389, 399–400 (C.A. 8), certiorari denied, 358 U.S. 830; *Connelly* v. *United States*, 249 F. 2d 576, 581 (C.A. 8), certiorari denied, 356 U.S. 921. What petitioner seeks is outright dismissal of the indictment simply because of the alleged violation of his rights as a grand jury witness who was himself suspect. In no event was he entitled to this. *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Scully*, 225 F.

[4] Cf. *United States* v. *Keenan*, 267 F. 2d 118, 126 (C.A. 7), certiorari denied, 361 U.S. 863; *United States* v. *Cleary*, 265 F. 2d 459 (C.A. 2), certiorari denied, 360 U.S. 936; *United States* v. *Pile*, 256 F. 2d 954 (C.A. 7); *Costello* v. *United States*, 255 F. 2d 389, 399–400 (C.A. 8), certiorari denied, 358 U.S. 830; *Connelly* v. *United States*, 249 F. 2d 576, 581 (C.A. 8), certiorari denied, 356 U.S. 921; *United States* v. *Klein*, 247 F. 2d 908, 920–921 (C.A. 2), certiorari denied, 355 U.S. 924; *United States* v. *Parker*, 244 F. 2d 943, 945-949 (C.A. 7), certiorari denied, 355 U.S. 836; *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Benjamin*, 120 F. 2d 521, 522 (C.A. 2); *Mulloney* v. *United States*, 79 F. 2d 566, 578–580 (C.A. 1), certiorari denied, 296 U.S. 658; *O'Connell* v. *United States*, 40 F. 2d 201, 205 (C.A. 2), certiorari dismissed, 296 U.S. 667; *United States* v. *Kimball*, 117 Fed. 156 (C.C.S.D.N.Y.).

2d 113 (C.A. 2), certiorari denied, 350 U.S. 897. Cf. *Holt* v. *United States*, 218 U.S. 245, 247–248; *Costello* v. *United States*, 350 U.S. 359; *Lawn* v. *United States*, 355 U.S. 339, 349–350.

2. There is likewise no merit in the contention (Pet. 9–11) that it was error for the trial judge to decline to ask the members of the petit jury panel, upon *voir dire*, whether any of them were members of or contributors to any organization having law enforcement as its object. The trial court has a broad discretion as to the questions to be asked prospective jurors. *Aldridge* v. *United States*, 283 U.S. 308, 310. While this discretion may, of course, be abused (see *id.*, at 310–315; *Sellers* v. *United States*, 271 F. 2d 475 (C.A.D.C.)), there was no abuse here. It is one thing, as noted by the court of appeals (R. 154; Pet. App. 8), for a judge to refuse to inquire whether any prospective juror belongs to an organization having as its special object the enforcement of the particular law under which the accused has been indicted. Cf. *Beatty* v. *United States*, 27 F. 2d 323 (C.A. 6) (prohibition); *Bailey* v. *United States*, 53 F. 2d 982 (C.A. 5) (same). It is another where the inquiry sought by the defendant relates to membership in an organization devoted to the improvement of law enforcement generally, which is the responsibility of every citizen. Petitioner, as the court below properly concluded (R. 154; Pet. App. 8), "cast his net too wide".

3. Petitioner contends (Pet. 11–12) that Richard Terker's testimony that his father told him, some time prior to the alleged unlawful receipt of money by petitioner, that petitioner had asked him for money and

that he had agreed to send petitioner some (*supra*, p. 8) was hearsay and inadmissible. We submit that the court of appeals correctly held (R. 155–162; Pet. App. 9–16) that this testimony was properly admitted both as a "declaration of the father's intention" and as a "declaration of a co-conspirator" (R. 155; Pet. App. 9).[5]

The existence of a design or plan to do an act is admissible to show that the act was probably done as planned, and, under a well recognized exception to the hearsay rule, the plan or design may be shown by the person's own statements as to its existence. 6 Wigmore, *Evidence* (3d ed., 1940), § 1725; *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295–296.

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[5] Petitioner's statement that "virtually the entire case against [him] was an edifice built of hearsay testimony" (Pet. 11–12) is unfounded. The only testimony besides Richard Terker's which has been challenged (see R. 154; Pet. App. 8) was (1) Mayhew's testimony that Harry Terker asked him to take the envelope which he received from Terker to Bridgeport so that Terker might keep a commitment he had made to petitioner (*supra*, pp. 6–7) and (2) Cohen's testimony that Harry Terker told him to draw $300 "[f]or Mr. Mayhew's use to pay somebody * * * on the [Bridgeport] job" (*supra*, p. 7). The court below rightly held that these statements "fall so clearly within Professor Morgan's sixth class [of utterances admissible as *res gestae*], 'Cases in which the utterance is contemporaneous with a nonverbal act, independently admissible, relating to that act and throwing some light upon it' [citing Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L. Journ. 229, 236 (1922)], * * * that we do not need here to consider other possible grounds of admissibility" (R. 154–155; Pet. App. 8–9). See *Beaver* v. *Taylor*, 1 Wall. 637, 642. Since petitioner "does not intend to press these points [the admissibility of Mayhew's and Cohen's testimony] seriously" (Pet. 12), there is no occasion to elaborate the matter further.

therefore admissible under the rule that acts done or statements made by one conspirator during the existence of the conspiracy and in furtherance of its object, are admissible against all. *Glasser v. United States*, 315 U.S. 60, 74; *Wiborg v. United States*, 163 U.S. 632, 658; *Nye & Nissen v. United States*, 336 U.S. 613, 619. Parker's statement was not a "merely narrative [declaration] of a past fact" (*United States v. Goodwin*, 129 F. 2d 1009, 1013 (C.A. 2); cf. *Van Riper v. United States*, 13 F. 2d 961, 967 (C.A. 2), certiorari denied sub nom. *Jackson v. United States*, 273 U.S. 762; *United States v. Campagna*, 110 F. 2d 324, 330 (C.A. 2), certiorari denied, 321 U.S. 807). As observed by the court of appeals (R. 162; Pet. App. 10), "[e]ven the instant payment to Annunzato lay in the future; moreover, it might well have been important to Harry's objectives that his son, then secretary-treasurer and later president of the company, should know of his father's policy if questions should ever arise or if a similar problem with respect to Annunzato should be presented in the future". It is immaterial, as the court noted (R. 158; Pet. App. 12), that the indictment did not charge a conspiracy. It is enough if the evidence, other than that whose admissibility is challenged discloses one. *Nash v. United States*, 229 U.S. 373, 377; *Pinkerton v. United States*, 328 U.S. 640, 647. Cf. *Dealy v. United States*, 152 U.S. 539, 542; *Logan v. United States*, 144 U.S. 263, 309.

4. During the cross-examination of the witness Haas, the trial judge, on the basis of his inspection of an F.B.I. agent's report of an interview with the witness, ruled that the report did not come within the "Jencks" Act, 18 U.S.C. 3500

Harry Terker's statement to his son, to the extent that it represented a statement of the father's intention to send petitioner money, *was* plainly admissible under this rule. The only question, as noted by the court of appeals (R. 155; Pet. App. 9), is "whether a different result is demanded because here the declarant accompanied his statement of future plan *with* an altogether natural explanation of the reason, in the very recent past, that had prompted it". The court, *we* submit, rightly held that the result should be the same. For, *while* "inclusion of a past event motivating the plan adds the hazard of defective perception and memory to that of prevarication," "this does not demand exclusion or even excision, at least *when*, as here, the event is recent, is *within* the personal knowledge of the declarant and is so integrally included in the declaration of design as to make it unlikely in the last degree that the latter would be true and the former false" (R. 157; Pet. App. 11).

The alternative basis of admissibility is equally capable of supporting the admission of Harry Terker's statement. If Terker *was* party to an agreement *with* petitioner to pay petitioner money—and this *was* clearly inferable from evidence other than that challenged, particularly *Maybew's* and Colon's testimony (see *supra*, pp. 6–7)—then Terker, as the court rightly concluded (R. 158–161; Pet. App. 12–15), *was* a co-conspirator *with* petitioner in a scheme to *violate* the statute under *which* petitioner *was* indicted.* Terker's statement to his son was

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* 29 U.S.C. 186 (*supra*, p. 3) prohibits equally the payment of money by the employer (subsection (a)) and its receipt by the employees' representative (subsection (b)).

(*supra*, pp. 3–4). Petitioner contends (Pet. 13–14) that the judge, although he was not requested to do so, should have called the agent for questioning as to the circumstances of the preparation of the report. The court of appeals held that it was unnecessary to consider whether the judge should have called the agent because in any event the error was harmless—for the reason that the report (which the court of appeals examined) had no impeachment value at all (R. 163–165; Pet. App. 16–19).[7]

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[7] As noted by the court of appeals (R. 164–165; Pet. App. 18), both the majority and dissenting opinions in *Rosenberg* v. *United States*, 360 U.S. 367, 371, 375, reject the view that the harmless error doctrine can never apply to statements producible under 18 U.S.C. 3500. In that case the error—failure to require production of a letter written by the witness-victim to the United States Attorney—was held harmless because the substance of the letter's contents had been otherwise made available to the defense. But there is no reason to distinguish such a situation from one in which inspection of an erroneously withheld document shows that it could not have aided the defense because it was lacking in impeachment value. Application of the harmless error principle in the latter situation does not, as petitioner argues (Pet. 13), "[violate] the basic concept behind the decision in *Jencks*." The *Jencks* decision, 353 U.S. 657, established the principle—now confirmed by the "Jencks" Act—that laying a foundation of inconsistency between a witness's testimony and the prior statement of the witness is unnecessary. But this is not to say that the error of withholding a producible statement would be necessarily prejudicial. If the appellate court's examination of the withheld document convinces the court that production could not have helped the accused because it was wholly lacking in impeachment value, the harmless error doctrine is as applicable as in any other situation in which error has not been prejudicial.

The agent's report is on file with the Clerk of this Court, should the Court desire to examine it.

Although we agree with the court that any error was harmless, we submit that there is no need to reach the question of harm because the failure of the judge to take the unsolicited action of calling the F.B.I. agent was not error.

Haas was interviewed twice by the Federal Bureau of Investigation—on September 24, 1958, and on October 20, 1960 (R. 12, 13, 15, 23–24). On the second occasion he signed a three-page statement, which was delivered to the defense and is not involved (R. 10, 19). On the day following the first interview, September 25, 1958, agent Clemente dictated a report of the interview, which Haas never saw (R. 13, 22). The report, dated September 29, 1958 (evidently the date the agent signed and forwarded it), consisted of slightly more than three single-spaced typewritten pages, approximately 800 words (R. 12, 13, 163; Pet. App. 17). The interview which was the subject of the report lasted approximately three hours (R. 17–18).

At the trial, the government attorney, after delivering to the defense the 1960 statement signed by the witness (R. 10), advised the court and defense counsel of the existence of the agent's report of the 1958 interview, stated that in the government's view the report was not producible under 18 U.S.C. 3500 because it was "merely the agent's summary of conversations with the witness", and delivered the report to the court for its inspection (R. 11–13). The court, noting that the report "appears to be a statement almost on all fours with the type

of statement * * * referred to in the Palermo case" (*Palermo* v. *United States*, 360 U.S. 343), ruled that it was not producible (R. 13).

Counsel for the defense made no request for leave to examine the agent who prepared the report, nor did he ask that the prosecutor or the court interrogate the agent.* The defense attorney's only request was that he be permitted to interrogate the witness to determine whether he had ever "adopted" the agent's report (R. 14). This request was granted (R. 15) and the witness was questioned to this end (R. 15–25). The defense attorney sought to ascertain whether the witness had said anything to the interviewing agents during the 1960 interview which might be construable as an adoption of anything contained in the 1958 report (R. 16, 17, 18, 23, 24). He was not successful in establishing that there had been any such adoption (*ibid.*). During this inquiry the witness testified that he "believe[d]" that the interviewing agent at the 1958 interview took notes (R. 15), but defense counsel made no attempt to ascertain, from the government or any other source, whether notes in fact were taken or, if so, how complete they were or whether they were still in existence. Following counsel's examination, the court repeated its ruling that the agent's 1958 report was not producible (R. 25).

This ruling was correct. The agent's report summarized in approximately 800 words statements made by the witness in a three-hour interview. It was possible, consequently, for the trial court to determine

* Questioning the agent was mentioned by no one during the proceedings.

from inspection that the report evidenced "substantial selection of material" and for that reason was not producible. *Palermo* v. *United States*, 360 U.S. 343, 352–353. In *Palermo*, where the report summarized in 600 words statements made by a witness at a conference lasting 3½ hours (360 U.S. at 355, note 12), the decision that the document was not producible was made solely on the basis of inspection. The Court, indeed, while acknowledging that in some instances extrinsic evidence "might be deemed relevant to assist the court's determination", stated that "[i]n most cases the answer will be plain from the statement itself." 360 U.S. at 355. Here, moreover, it is undisputed that the report was dictated on the day following the interview. This fact also served to remove it from the purview of 18 U.S.C. 3500 (because of the contemporaneous recordation requirement of subsection (e)(2) (*supra*, p. 4))—unless the agent took "complete notes" during the interview and incorporated the witness's language, in substantially verbatim form, into his report. See 360 U.S. at 353.[9]

But even if it be assumed, *arguendo*, that, notwithstanding these considerations, further pertinent information might have been obtained from the agent, we submit that it was clearly not error for the trial court to fail to call him. On its face, the report appeared

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[9] As noted *supra*, p. 16, Haas "believe[d]" that the agent took notes during the interview, but whether or not the agent in fact did so—and, if he did, how "complete" the notes were, and whether, if "complete", they were fully incorporated in the agent's report—are matters which were not pursued by defense counsel and do not appear.

beyond the coverage of 18 U.S.C. 3500, and petitioner's counsel did not suggest interrogation of the agent or that anything would be gained by calling him. *Campbell* v. *United States*, 365 U.S. 85, on which petitioner relies (Pet. 13), is distinguishable. In that case, not only did defense counsel, unlike defense counsel here, indicate a desire that the agent be called for questioning, but there was a reason for calling the agent which was wholly absent here. The witness had admitted that he had adopted a statement of the agent, which the government had been ordered to produce (but was unable because it did not have in its possession a statement of the type the witness described), and the principal reason for calling the agent was to determine whether the report in controversy was the statement referred to by the witness or a copy of it. 365 U.S. at 87–95. It was, indeed, in all probability, the fact that this aspect of the *Campbell* case was absent here which explains why the defense attorney in this case, unlike counsel in *Campbell*, did not request that the agent be called.

5. Petitioner's final contention—that the trial court should have ordered the delivery to the defense of an F.B.I. agent's report of an interview with Richard Terker, notwithstanding that the defense did not request its production (Pet. 14)—is also untenable. Even if it appeared that the report was of a type pro-

ducible under 18 U.S.C. 3500—and it does not [10]—the failure of the defense to ask for the report, the existence of which was acknowledged by the government (R. 82), is, as the court of appeals held (R. 166; Pet. App. 20), a complete answer to this contention. 18 U.S.C. 3500(b) (*supra*, pp. 3-4).

Petitioner's attempt to excuse the defense's failure to ask for the report on the ground that the trial court, following a "heated exchange" concerning "handwritten notes taken during the interview" which was the subject of the report (see note 10), "abruptly cut off the subject from inquiry" and "put an end to defendant's quest" (Pet. 14) is based on an inaccurate representation of the record. The subject of the "exchange" was a proposal by defense counsel to "claim an inference" before the jury from the fact that the agents' notes, taken during the interview, were subsequently destroyed (Pet. App. B, p. 22). Government counsel, pointing out that the

[10] It appears that the report was an ordinary memorandum of interview—similar to that pertaining to witness Haas (*supra*, p. 15)—in which the interviewing agent or agents reported statements orally made by the witness. See R. 82. In this instance the interview lasted from two to two and a half hours (R. 81). In view of the defense's failure to request the production of the report, there is no occasion to consider whether, if it had been asked for, it would have been producible as "secondary evidence of the contents of" certain longhand notes taken by the interviewing agents—later routinely destroyed (see Pet. App. B, p. 22)—which the witness testified he had occasion to "look over" following the interview and which he said he "imagine[d]" were accurate. See opinion below at R. 166, Pet. App. 19. Cf. *United States* v. *Thomas*, 282 F. 2d 191, 194-195 (C.A. 2).

notes were destroyed "in the usual course of business by the F.B.I.," opposed this proposal (*id.*, pp. 22–23). The court directed that there be no argument between counsel in the jury's presence with respect to "what inferences they can or cannot draw" from the destruction of the notes (p. 23), and, following further discussion (pp. 23–25), directed that "that subject * * * be dropped" (p. 25). No other limitation was imposed upon counsel. The court, indeed, emphasized to counsel their complete liberty of action as to any aspect of the case (including the calling of witnesses), subject to the foregoing specific limitation (pp. 23, 24–25).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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